BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BRADLEY D. SPEER	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,007,225
SAMMONS TRUCKING	)	& 1,008,005
Respondent	)	
AND	)	
	)	
FIREMAN'S FUND INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent appeals the October 22, 2004 Award of Administrative Law Judge John D. Clark. Claimant was awarded benefits for injuries suffered after the Administrative Law Judge (ALJ) determined that claimant's contract of hire with respondent occurred while claimant was a resident of and present in Wichita, Kansas. Respondent contends that claimant's contract of hire was not finalized until claimant presented himself in either Houston, Texas, or in Missoula, Montana, neither location of which would provide the Kansas Workers Compensation Division with jurisdiction. The Appeals Board (Board) heard oral argument on March 15, 2005.

APPEARANCES

Claimant appeared by and through his attorney, Shayla C. Johnston of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Terry J. Torline of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge.

ISSUES

1. Does the Kansas Workers Compensation Division have jurisdiction over this matter?

2. What is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary file contained herein, the Board finds as follows:

Claimant initially became employed as a truck driver when he met and went to work for a gentleman named Bob Wilbur. Mr. Wilbur, an owner-operator, owned a truck which was leased to respondent to haul goods and materials. Claimant was initially hired by Mr. Wilbur as a truck driver in the early 1990s. When claimant first went to work for Mr. Wilbur, claimant was not authorized by respondent's office in Houston, Texas, to drive. After approximately two months of driving, Mr. Wilbur advised that claimant should go to the respondent's office in Houston to obtain the appropriate authorization to continue driving. In 1995, claimant and Mr. Wilbur contacted the respondent's Houston office about arranging for claimant to become authorized as a respondent driver. Claimant was advised he needed to come to Houston to the respondent offices, where he would go through orientation, drug screening and a driving test. Claimant testified that he was not hired until he had gone to Houston and passed the appropriate tests.[1] After claimant passed the appropriate tests and completed the appropriate paperwork, he was authorized to continue driving as a respondent driver. Bob Wilbur was the contractor, with claimant driving for and being paid by Mr. Wilbur. The contract with Sammons was through Mr. Wilbur.

Mr. Wilbur, who was in bad health, ultimately reached a point where he no longer desired to live in the pain that he was experiencing and, in either 1997 or 1998, committed suicide. When this occurred, claimant brought the truck back to Wichita and, after contacting Mr. Wilbur's family, they took control of the truck and parted company with respondent. This left claimant without a truck and without a job.

Claimant then contacted respondent at its corporate headquarters in Missoula, Montana, about continuing to drive for respondent. The evidence in this regard is somewhat confusing as claimant, who testified on six occasions in this matter, at times testified that he continued in his employment with Sammons, but at other times indicated that he desired to be re-employed by Sammons. Claimant acknowledged that when he

[1] Claimant's Depo. (Dec. 4, 2002) at 19.

contacted Sammons after Mr. Wilbur's death, he submitted certain requests to respondent, including an increase in cents per mile paid, retention of all or part of his seniority, an increase in benefits, a penny-per-mile bonus and tarp pay. When claimant contacted respondent in Missoula, he spoke to a person named Kathy Smith. Ms. Smith advised that as lead dispatcher, she did not have the authority to agree to claimant's contract requests. She then contacted a representative named Otis. After conferring with Otis, claimant was advised by Ms. Smith that Sammons would accept claimant's employment modification requests but that claimant had to come to Missoula in order to submit to another drug test. It is acknowledged that claimant was at his residence in Wichita, Kansas, when this conversation with the Missoula, Montana, office occurred.

Claimant then went to Missoula, went through a reorientation and successfully passed the drug test. He completed certain paperwork, signing an agreement which outlined the arrangement between him and respondent. Claimant testified that he was basically rehired in 1997 or 1998 when he went to the Montana office.

Claimant continued driving for respondent for several years. On November 30, 2001, while delivering a load in San Francisco, California, claimant was struck by the side view mirror of a white pickup truck as he was standing on the street, next to his vehicle. Claimant testified he was knocked into the trailer, suffering injury to his left shoulder, upper back and neck. Claimant continued driving for respondent, seeking no medical treatment at that time.

Claimant alleges he was reinjured on February 15, 2002, while in Chandler, Texas (or perhaps Conroe, Texas), while covering a load with a tarp. Claimant testified that while pulling on the tarp, he felt something pop in his back. He took it easy the rest of the way, driving to a truck stop and going to bed. The next day, in Queen Creek, Arizona, while unloading his load, his back and chest started hurting, and claimant feared he was having a heart attack and the EMS was sent out. Claimant was advised by the EMS personnel that he was suffering from the flu.

Again, on September 1, 2002, while loading and "tarping" a load in Youngstown, Ohio, claimant felt a burning sensation across the back of his shoulders and neck. He delivered the load to Fontana, California, but had to obtain assistance to get the tarp off the truck because of significant pain across his shoulders and into his neck. He reloaded in Fontana and then proceeded to Colorado. After unloading in Colorado, claimant returned to Wichita on September 7, 2002, and on September 9, 2002, he presented himself at the office of Willy G. Pereira, M.D., of the Southeast Clinic in Wichita. Before September 9, 2002, claimant had been having difficulties, but not to the extent that he could no longer work. Dr. Pereira put work restrictions on claimant which Sammons was unable to accommodate, and claimant was no longer able to drive for respondent. Claimant had fueled his truck on September 10, 2002, under the 50-pound work restriction

placed on him by Dr. Pereira. But then he was advised that Sammons could not accommodate his restrictions.

Claimant continued treatment with Dr. Pereira, undergoing an MRI, which displayed a herniated disc in claimant's neck at C5-6 and bulging at T6-7, T8-9 and T9-10. He was then referred to Eustaquio Abay, M.D., on November 26, 2002. Claimant underwent a C5-6 anterior discectomy on January 29, 2003, with recovery taking approximately a year and a half. Claimant was released with restrictions on June 16, 2003. In July 2003, claimant obtained a job with Wood Haulers as a truck driver. He was performing approximately the same functions that he did for respondent. Claimant continued working for Wood Haulers until approximately November 10, 2003, although acknowledging that he suffered from mid back pain during this time.

Claimant also, in the middle of his treatment for his back, suffered heart complications and underwent heart surgery. While employed with Wood Haulers, claimant encountered difficulties in returning to Wichita, Kansas, his personal residence, in order to meet with his doctors. This difficulty was partly responsible for claimant's inability to continue driving for Wood Haulers. Claimant testified that on October 16, 2003, Michelle R. Brown, M.D., his cardiologist, put restrictions on him. That was because they were requiring him to run too many miles. He was physically unable to load and unload the truck, tarp, and drive 1500 miles directly after that. About half way through tarping a load, he could not walk. He was having terrible pain in his mid back, which Chris D. Fevurly, M.D., indicated was being aggravated by his heavy work duties performed in his employment with Wood Haulers.[2] Those activities were causing him pain in his back and he just could not do it. Claimant told his employer that that was causing him problems. Claimant was told to bring them the truck, go home, "get all your doctoring done," come back and they would put him back to work.[3] Claimant further testified that his employment at Wood Haulers ended November 10, 2003. His employment ended because he could not perform the job duties, such as lifting, keeping the truck running and the hours.[4] After losing his job with Wood Haulers, claimant applied for Social Security benefits and has not worked anywhere since that time. As of the time of claimant's final deposition on June 25, 2004, claimant was not seeking employment.

In workers compensation litigation, it is the claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence.[5]

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[2] Fevurly Depo., Ex. 2.

[3] P.H. Trans. (February 5, 2004) at 16-17.

[4] R.H. Trans. (May 26, 2004) at 14.

[5] K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

The first issue which needs to be considered by the Board is whether the Kansas Workers Compensation Act applies to this claim. Respondent contends that claimant's contract of employment with respondent was created either in Houston, Texas, or in Missoula, Montana, neither of which would confer jurisdiction on this court. Jurisdiction is conferred on the Kansas Workers Compensation Division where: "(1)The principal place of employment is within the state; or (2) the contract of employment was made within the state, unless the contract otherwise specifically provides . . . ."[6]

The Board must first consider where the contract was "made." The contract is "made" when and where the last necessary act for its function is done.[7] When that last necessary act is the acceptance of an offer during a telephone conversation, the contract is "made" where the acceptor speaks his or her acceptance.[8]

In this instance, the Board must consider two potential contract arrangements between claimant and respondent. The first occurred while claimant was in Wichita, Kansas, between him and respondent's Houston office. At that time, claimant was employed by Bob Wilbur and, per the instructions of Mr. Wilbur, needed to obtain authorization to continue driving for respondent. Contact with the Houston office necessitated claimant's appearing in the Houston office in order to undergo an orientation, drug test and driving test. Claimant testified that in his opinion, he was not hired until he went to Houston, Texas.[9] Claimant also filled out substantial paperwork while in Houston and, upon passing all of the tests and completing the paperwork and training, he was authorized to drive for respondent. It is noted that claimant, at that time, was being paid by Mr. Wilbur and not by respondent.

Unfortunately, this relationship between Mr. Wilbur and respondent came to an end with the death of Mr. Wilbur. At that time, claimant acknowledged he returned the truck to Wichita and the truck was then taken by Mr. Wilbur's family. Claimant contacted respondent's home office in Missoula, Montana, about working for Sammons. Claimant testified that he did not work for approximately three months after Mr. Wilbur's death up to the time where he did begin again driving for respondent.

When claimant contacted respondent's office and spoke to Kathy Smith, respondent's lead dispatcher, he submitted certain benefit modification requests to

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[6] K.S.A. 44-506.

[7] *Smith v. McBride & Dehmer Construction Co.*, 216 Kan. 76, 530 P.2d 1222 (1975).

[8] *Morrison v. Hurst Drilling Co.*, 212 Kan. 706, ¶ 1, 512 P.2d 438 (1973); see Restatement (Second) of Contracts, § 64, Comment c (1974); *Shehane v. Station Casino*, 27 Kan. App. 2d 257, 3 P.3d 551 (2000).

[9] Claimant's Depo. (Dec. 4, 2002) at 18-19.

respondent. Claimant requested an increase in his mileage, a one-cent-per-mile bonus pay, tarp pay, a retention of all or part of his seniority, and benefits. Ms. Smith advised that she did not have the authority to accept claimant's requests and conferred with an individual identified only as Otis at the Missoula office. Claimant was then advised that Otis had accepted claimant's requests for reemployment, but that claimant had to come to Missoula in order to undergo additional training and another drug screening. Claimant traveled to Missoula, passed the test successfully and began driving for respondent out of its Missoula headquarters.

As noted above, during a telephone conversation, the act of the acceptance of an offer is the last act necessary for the contract to be formulated. In this instance, while claimant may have been employed by respondent after the Houston contact, it is obvious that claimant was no longer employed by them after the death of Mr. Wilbur. Claimant then contacted Missoula with the desire to become reemployed. Claimant acknowledged that after undergoing the successful completion of his test in Missoula, he was rehired.[10] And while the contact between claimant and the Missoula, Montana, office occurred while claimant was in Wichita, Kansas, the Board notes the last act necessary for the formulation of the contract was the acceptance by respondent's representative, Otis, of the terms presented to Sammons by claimant. Therefore, the last act necessary to formulate the contract occurred in Missoula, Montana, with the acceptance of claimant's proposals. The Board finds that it does not have jurisdiction to consider this matter pursuant to K.S.A. 44-506, as the contract of employment was not made within this state.

Claimant contends, however, that under K.S.A. 44-506 a separate issue must be considered. K.S.A. 44-506 not only considers where the contract was formulated, but also considers the principal place of employment and whether that is within this state. It is acknowledged that respondent's principal place of employment was either Missoula, Montana, or Houston, Texas, with it having no office in Kansas. In fact, there is little or no contact with the state of Kansas, with the exception of claimant's occasional return to Wichita, his residence, in order to seek medical treatment for either his work-related injuries or his heart condition.

However, the Board must consider, along with respondent's principal place of employment, claimant's principal place of employment. In *Knelson*,[11] the Kansas Court of Appeals concluded that the claimant's principal place of employment for purposes of the Kansas Workers Compensation Act was within the state of Kansas at the time of his injury. In *Knelson*, the claimant was a professional hockey player under contract to Meadowlanders, Inc., a New Jersey Devils' hockey club. The claimant was, at the time,

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[10] Claimant's Depo. (Dec. 4, 2002) at 32.

[11] *Knelson v. Meadowlanders, Inc.*, 11 Kan. App. 2d 696, 732 P.2d 808 (1987).

playing for the Wichita Wind in Wichita, Kansas, and was injured in a hockey game in Salt Lake City, Utah. At the time of the injury, the claimant in *Knelson* was employed by Meadowlanders out of New Jersey, but had as his base of operation Wichita, Kansas. The claimant lived in Wichita, practiced in Wichita and traveled from that location to outlying areas for hockey matches. The claimant was paid in Wichita and it was determined in *Knelson* that Wichita was the claimant's principal place of employment, thereby satisfying the provisions of K.S.A. 44-506.

In this instance, *Knelson* is distinguishable. This claimant, while living in Wichita, Kansas, spent very little time in Wichita, Kansas. His base of operation was either Houston, Texas, or Missoula, Montana, the locations of respondent's dispatch centers. Claimant acknowledged he was rarely in Kansas and had to make special arrangements in order to get back to Wichita in order to see his doctors for his injuries, including his neurosurgeon. The Board finds that in this instance, as claimant has not proven that his principal place of employment was within the state of Kansas, he does not meet that requirement of K.S.A. 44-506.

The Board finds that is does not have jurisdiction to consider this matter as the Kansas Workers Compensation Act does not apply to the injuries suffered by claimant while employed with respondent at the various locations around the United States, all of which were outside the state of Kansas. The Board, therefore, finds that the Award of ALJ John D. Clark dated October 22, 2004, should be, and is hereby, reversed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated October 22, 2004, should be, and is hereby, reversed, and this claim is dismissed for lack of jurisdiction.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Ireland Court Reporting	
Transcript of Preliminary Hearing	$313.00
Transcript of Regular Hearing	$263.00
Deposition of Jon E. Rosell	$517.00
Deposition of Philip R. Mills, M.D.	$219.20
Deposition of Bradley D. Speer	$425.46

Barber & Associates

Transcript of Regular Hearing	$ 77.90
Transcript of Preliminary Hearing	$157.45
Deposition of Bradley D. Speer	$585.30
Deposition of Chris D. Fevurly, M.D.	$406.70
Deposition of Dan Zumalt	$232.70

IT IS SO ORDERED.

Dated this ____ day of April 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Shayla C. Johnston, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director